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No. 357

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	4
Conclusion	6
Appendix A	7
Appendix B	24

CITATIONS

Cases:

Chestnut Securities Co. v. *United States*, 62 F. Supp. 574	4
Consolidated Edison Co. of New York v. *United States*, 135 F. Supp. 881, certiorari denied, 351 U.S. 909	4, 6
Dixie Pine Co. v. *Commissioner*, 320 U.S. 516	5
Security Mills Co. v. *Commissioner*, 321 U.S. 281	5, 6
United States v. *Gilbert Associates, Inc.*, 345 U.S. 361	5

Statutes:

Internal Revenue Code of 1939:	
Sec. 23(c) (26 U.S.C. 1946 ed., Sec. 23(c))	2, 24
Sec. 41 (26 U.S.C. 1946 ed., Sec. 41)	2, 24
Sec. 42(a) (26 U.S.C. 1946 ed., Sec. 42(a))	2, 24
Sec. 43 (26 U.S.C. 1946 ed., Sec. 43)	2, 25
Sec. 48(c) (26 U.S.C. 1946 ed., Sec. 48(c))	2, 25

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UNITED STATES OF AMERICA, PETITIONER

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (Appendix A, *infra*, p. 23) is unreported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 7-21) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1960. (Appendix A, *infra*, p. 22). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Does a local property tax liability accrue, for the purpose of deduction by an accrual-basis taxpayer under Section 23(c) of the Internal Revenue Code of 1939, when the tax is paid under protest pursuant to an administratively final assessment, or when the ensuing refund suit is terminated by settlement in a later year?

2. If the tax accrues in the year of payment under protest, does the receipt of a partial refund in a later year, under the settlement of the refund suit, constitute income to the taxpayer in the year of settlement?

3. In any event, does the taxpayer's partial recoupment of the tax for which it has received a deduction in a prior year, now closed by the statute of limitations, constitute taxable income to it irrespective of whether the deduction was properly taken?

STATUTES INVOLVED

The statutory provisions involved, Sections 23(c), 41, 42(a), 43 and 48(c) of the Internal Revenue Code of 1939, are set forth in Appendix B, *infra* pp. 24-25.

STATEMENT

The material facts, as set forth in the opinion of the Court of Appeals (Appendix A, *infra*, pp. 7-21), may be summarized as follows:

The taxpayer is a public utility corporation which keeps its books and files its returns on a calendar-year accrual basis. The taxpayer owns considerable real estate in New York City on which it pays local property taxes, these taxes being assessed by application of the tax rates established by the City Council to final assessed valuations fixed by one City Tax Commission. In each of the years 1938-1950, with the exception of

1942 and 1943, the taxpayer contested part of the taxes so imposed; but before the end of each of these years, the taxpayer's protest was overruled by the taxing authorities, the proposed assessment became administratively final, and the full amount of such assessment was paid by the taxpayer, under protest and for the stated purpose of avoiding liens, seizures, and penalties. Such payment was not necessary in order to entitle the taxpayer to judicial review in the form of prescribed certiorari proceedings in the New York courts, although those proceedings would not stay the imposition of penalties or the foreclosure of liens.

The certiorari proceedings instituted by the taxpayer with respect to the years 1938-1940 were concluded in 1941 by settlement which fixed the taxes at a somewhat lower figure than the taxes assessed, and the difference was refunded, although the amount of refund was less than the taxpayer had sought to recover. In 1951 there was a similar settlement of the certiorari proceedings instituted by the taxpayer with respect to the years 1946-1950.

The taxpayer brought the present suit to recover an alleged overpayment of federal income taxes for 1951, contending that it should be permitted to deduct in 1951, as accruing in that year, that part of the disputed local property taxes for 1946-1950 which was recognized in the 1951 settlement as properly assessed. It argued that it was required to deduct in the years of payment under protest only that portion of the property taxes which was uncontested. The Government, on the other hand, contended that the taxpayer was required to deduct the entire amounts of the local property taxes in the years of payment under protest, and

that it was required to include in its gross income for 1951 the partial refund under the settlement reached in that year. Having paid its 1951 taxes under the Government's theory, the taxpayer brought the instant refund suit.

The District Court granted the Government's motion for summary judgment, following the decision of the Court of Claims in *Consolidated Edison Co. of New York* v. *United States*, 135 F. Supp. 881, certiorari denied, 351 U.S. 909. (Appendix A, *infra*, p. 23.) The Court of Appeals for the Second Circuit reversed, with Judge Clark dissenting. (Appendix A, *infra*, pp. 7-21.) [1]

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals expressly rejects the rule adopted by the Court of Claims in *Chestnut Securities Co.* v. *United States*, 62 F. Supp. 574, and applied by that court to the taxpayer here involved and to virtually identical facts (save for the tax years in issue) in *Consolidated Edison Co. of New York* v. *United States*, 135 F. Supp. 881, certiorari denied, 351 U.S. 909. In the latter case, the Court of Claims held that the instant taxpayer was required to accrue and deduct the disputed portion of its New York real property taxes for the years 1938 and 1939 as of the time of payment under protest, and not in the later year (1941) when the ensuing refund litigation was settled.

[1] The Government also raised an affirmative defense of collateral estoppel, invoking the decision of the Court of Claims in *Consolidated Edison Co. of New York* v. *United States*, *supra*. The Government's motion for summary judgment based on this defense was denied by the District Court (162 F. Supp. 854), and that ruling was affirmed by the Court of Appeals (Appendix A, *infra*, pp. 7-21).

In the case at bar, dealing with the taxpayer's New York real property taxes for subsequent tax years, the Court of Appeals explicitly disagreed with the decision of the Court of Claims and its rationale. (Appendix A, *infra*, pp. 15-16.) The court below held that a disputed local property tax paid under protest does not accrue, for the purposes of federal income tax deduction, until the settlement or other termination of an ensuing refund suit.

The conflicting rules thus adopted by the Court of Claims and the Court of Appeals for the Second Circuit with respect to accrual and deduction of local taxes paid under protest prevent the uniform administration of the federal tax laws to a situation which, it will be evident, arises with considerable frequency throughout the United States. Since controversies over local taxes are common, the determination of the proper year for the deduction of such taxes by accrual-basis taxpayers in the computation of their federal income taxes is a matter of considerable importance both to accrual-basis taxpayers and to the federal revenues. Review is warranted so that this Court may make a definitive determination of the proper rule with respect to accrual of local taxes paid under protest in order to secure uniformity, so far as may be possible in this area. Cf. *United States* v. Gilbert Associates, Inc., 345 U.S. 361.

2. The Court of Appeals, in support of its decision, invoked cases in which this Court has held that accrual-basis taxpayers may not accrue and deduct contested local taxes until the termination of the contest. E.g., *Dixie Pine Co.* v. *Commissioner*, 320 U.S. 516, and *Security Mills Co.* v. *Commissioner*, 321 U.S 281. How-

ever, in those cases this Court was dealing with, and expressly confined its holding to, contested taxes which were not finally assessed and which remained unpaid until the conclusion of the dispute. As the Court of Claims pointed out in *Consolidated Edison Co. of New York* v. *United States, supra,* there are cogent reasons for reaching a different result where the tax has been finally assessed and paid—even though it be paid under protest—under the annualization-of-income concept which, as stressed in *Security Mills* and related cases, is fundamental to the effective and even-handed administration of the federal tax laws. As is pointed out the dissenting opinion of Judge Clark in the instant case, practical considerations also support the rule adopted by the Court of Claims.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

GRANT W. WIPRUD,
DOUGLAS A. KAHN,
Attorneys.

AUGUST 1960.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 298—October Term, 1959.

(Argued April 13, 1960 Decided May 25, 1960.)

Docket No. 26041

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE.

Before: LUMBARD, *Chief Judge*, and SWAN AND CLARK, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York.

Plaintiff appeals from the order and judgment of Judge Sugarman denying plaintiff's motion for summary judgment, granting defendant's motion for sum-

mary judgment, and dismissing the complaint in an action to recover an alleged overpayment of income taxes for the year 1951. Judgment reversed.

WHITMAN, RANSOM & COULSON, *Attorneys for Plaintiff-Appellant.* James K. Polk, Harold F. Noneman, and Julius M. Jacobs of Counsel.

S. HAZARD GILLESPIE, JR., United States Attorney, *for Defendant-Appellee.* Arthur V. Savage, Assistant United States Attorney of Counsel.

SWAN, *Circuit Judge:*

Plaintiff-Appellant is a well-known public utility corporation which keeps its books and files its tax returns on an accrual and calendar year basis. It brought the present suit under 28 U. S. C. A. §1346(a) to recover an alleged large overpayment of federal income taxes for the year 1951. Defendant's answer to the complaint interposed a general denial and an affirmative defense of collateral estoppel. A motion for summary judgment based on the affirmative defense was denied by Judge Palmieri in 1958 in an opinion reported at 162 F. Supp. 854. Thereafter, upon amended pleadings and a stipulation which eliminated all factual issues, each party moved for summary judgment. The district judge, Judge Sugarman, before whom these motions were argued, denied plaintiff's motion, granted defendant's, and dismissed the complaint. This is the order appealed from.

The ultimate questions to be decided are two, namely, (1) whether, under §23(c) of the Internal Revenue

Code of 1939, a contested real estate tax liability accrued in the year the litigation was settled, or in a prior year when the contested tax was involuntarily paid under protest; and (2) whether the receipt of a partial refund of the contested and involuntarily paid tax, constituted income to the taxpayer in the year of settlement.

Before reaching the merits of these issues, it is desirable to consider defendant's contention of collateral estoppel based upon a decision of the Court of Claims which adjudicated the identical issues with respect to contested real estate taxes of earlier years. *Consolidated Edison Co. of N. Y.* v. *United States,* 133 Ct. Cl. 376, 135 F. Supp. 881, cert. den. 351 U. S. 909. The Court of Claims held that the contested taxes were deductible as a liability in the year they were paid to the City of New York, and that the amount refunded was income to the taxpayer in the year it was received from the City.[1]

On the issue of collateral estoppel both parties rely on *Commissioner* v. *Sunnen,* 333 U. S. 591, as they also did when that issue was before Judge Palmieri in 1958. He decided the issue adversely to defendant. We agree with his conclusion and are entirely satisfied with the reasoning of his opinion reported in 162 F. Supp. 854. As the *Sunnen* opinion states at page 601:

> "* * * And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable,

[1] The stipulation mentioned above preserved the Government's right to raise the question of *res judicata* or collateral estoppel on any appeal taken herein.

even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or, if consistency in decision is considered just and desirable, reliance may be placed upon the ordinary rule of *stare decisis.*"

Under the New York law as to real estate taxes, the assessed valuation and the tax imposed on a given parcel of land for a given year is separate from, independent of, and unconnected with the assessed valuation and tax imposed on that parcel for any other year; and the same is true with respect to the administrative and judicial proceedings by which an aggrieved owner seeks review of the contested assessed valuation and the tax on that parcel for the given year. Hence we think it obvious that "the relevant facts" in the Court of Claims case and in the case at bar "are separable, even though they may be similar or identical," and that collateral estoppel does not control the legal issues "which recur in the second case."

To facilitate the presentation and consideration of the facts and legal issues involved, the stipulation above mentioned set forth an illustrative example which is applicable to all the years herein involved and reads as follows:

"(a) for the year 1949 plaintiff was notified, on January 25, 1949, of a tentative assessment in the amount of..... $100.

(b) plaintiff duly filed by March 15, 1949, a bona fide protest, admitting liability of.... $ 85.
(c) after hearing duly held and on or about May 25, 1949, final assessment was made in the amount of..... 100.
(d) thereafter on or about October 1, 1949, under protest and for the stated purpose of avoiding liens, seizures, levies, penalties, interest, etc., and reserving all rights, payment was made of..... 100.
(e) on October 25, 1949, certiorari proceedings were duly instituted in the New York Supreme Court admitting liability of, and denying liability in excess of..... 85.
(f) in December, 1951, the certiorari proceedings were settled, fixing the tax liability at..... 95.
and establishing an overpayment which was duly refunded, in the amount of..... $ 5."

The government claims, in terms of the example, that the taxpayer was required to deduct the entire $100 from its gross income in 1949, the year in which the money was paid, and to include in its gross income for 1951 the $5 refunded to it by the City in that year. The taxpayer's position is that it was required to deduct in 1949 only $85, the amount of real estate tax paid and uncontested and that it should be permitted to deduct in 1951 an additional $10, the portion of the disputed $15 ultimately determined to have been properly assessed. The overall effect of the taxpayer's position would be to require the payment of a greater tax than the government claims is due in the year 1949, because of the smaller deduction, and a lesser tax in the year 1951, because of the additional $10 deduction accrued then and the absence of the inclusion of the $5 refund

in gross income. Having paid its 1951 taxes under the government's theory, the taxpayer claims that it is now entitled to a refund.

The stipulation states the legal issues raised herein, in terms of the illustrative example, as follows:

> "(a) whether plaintiff is entitled to a deduction in 1951 of $10, which represents that portion of the disputed $15 which was determined in 1951 to have been properly assessed, and
>
> (b) whether there was erroneously included in plaintiff's 1951 taxable income $5, which represents that portion of the disputed $15 which was determined in 1951 to have been improperly assessed and which was refunded to plaintiff."

This illustrative example has greatly simplified the facts necessary to be stated on this appeal. It will suffice to say that appellant owns many parcels of real estate in New York City with respect to which corporate real estate taxes for each year were assessed by applying tax rates established by the City Council to final assessed valuations fixed by one City Tax Commission. In each of the years 1938 to 1950, with the exception of 1942 and 1943, the appellant contested in the manner prescribed by local law part of the taxes so imposed. The contest proceedings in respect to the years 1938-1940 were concluded in 1941 by a settlement which fixed the taxes at a somewhat lower figure than the taxes assessed, and the difference was refunded, although this was less than appellant had sought to recover.[2] A similar settlement was concluded

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[2] An illustrative example identical with the one set forth above, except for difference in dates, was stipulated by the parties and adopted by the Court of Claims in the prior suit involving the years 1938-1940.

in December 1951 of the contest proceedings instituted in respect to the years 1946-1950.

We turn now to the merits of the issues presented by the illustrative example. The sections of the 1939 Code which are involved are §§23(e), 41, 42, 43 and 48.[3] Section 23 allows a deduction from gross income to be taken for "taxes paid or accrued within the taxable year"—with exceptions not here material. Section 41 prescribes that net income shall be computed "in accordance with the method of accounting regularly employed in keeping the books of such taxpayer," unless the method employed does not clearly reflect the income. Section 42 recognizes that items of income, though normally to be included in gross income in the taxable year of receipt, may "under methods of accounting permitted under section 41" be properly accounted for as of a different period. Section 43 says that deductions and credits "shall be taken for the taxable year in which 'paid or accrued' or 'paid or incurred,' upon the basis of which the net income is computed, * * *" Section 48 directs that "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed.

In a number of cases involving the counterparts of these sections, the Supreme Court has explained that a tax liability becomes deductible under §23(e), to a taxpayer keeping its books on the accrual basis, only when all events have occurred which determine the fact and amount of the tax liability. This "all-events rule," announced in *United States* v. *Anderson*, 269 U. S. 422,

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[3] These are the same as their counterparts in the 1954 Code and in the prior Revenue Acts. Reference will be made in terms of the 1939 Code.

was very clearly restated in *Dixie Pine Co. v. Commissioner*, 320 U. S. 516, 519:

> "It has never been questioned that a taxpayer who accounts on the accrual basis may, and should, deduct from gross income a liability which really accrues in the taxable year. It has long been held that in order truly to reflect the income of a given year, all the events must occur in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid; and this cannot be the case where the liability is contingent and is contested by the taxpayer. Here the taxpayer was strenuously contesting liability in the courts and, at the same time, deducting the amount of the tax, on the theory that the state's exaction constituted a fixed and certain liability. This it could not do. It must, in the circumstances, await the event of the state court litigation and might claim a deduction only for the taxable year in which its liability for the tax was finally adjudicated."

This was reaffirmed in *Security Flour Mills Co. v. Commissioner*, 321 U. S. 281, at 284. And *Lewyt Corp. v. Commissioner*, 349 U. S. 237, 242-243 states that "the concept 'accrued' embodies the annual accounting principle," and the amount of the tax accrued within the taxable year "is to be determined in accord with the normal accounting concepts relevant to the accrual basis."

Applying these cases to the issues presented by the illustrative example it is clear that the uncontested $85 of the $100 tax accrued and was deductible in 1949. Indeed, this is admitted by both parties. We think it equally clear that the contested $15 tax liability was, for

income tax purposes, a contingent liability which might or might not become a fixed liability depending upon the outcome of the State litigation. In cases of a contested item of liability, accountants usually indicate the existence of contest by showing the item as contingent, or by a footnote. Ten dollars of the contested $15 became a fixed liability when the litigation terminated in 1951, and became deductible in that year. The remaining $5 never became a liability of the taxpayer. Nor was the receipt of that sum from the City in 1951 income of the taxpayer; it was the realization of an asset of contingent value purchased by the taxpayer when it paid the City the $15 it was contesting. A payment may constitute a capital expenditure, an exchange of assets, a prepaid expense, a deposit, or a current expense. When the exact nature of the payment is not immediately ascertainable because it depends on some future event, such as the outcome of litigation, its treatment for income tax purposes must await that event. Thus in *Doyle* v. *Commissioner*, 2 Cir. 110 F. 2d 157, this court held that the income tax treatment of forfeited payments received under a contract to sell real estate was to be determined by, and was to be reflected in the year of the subsequent events, rather than the year in which the payments were received; see also *Bressner Radio, Inc.* v. *Commissioner*, 2 Cir. 267 F. 2d 520.

It is true that the Supreme Court cases above cited did not involve a taxpayer who paid a contested tax during the pendency of the contest. That question was presented in the *Consolidated Edison* case in the Court of Claims, *supra*, and that Court followed its earlier decision in *Chestnut Securities Co.* v. *United States*, 104 Ct. Cl. 489, 62 F. Supp. 574 which held that "Accrual, from the debtor's standpoint, precedes payment and does not survive it." With due respect we disagree

with this view. Indeed, the findings of fact with respect to applicable accounting principles which the Court of Claims made in the *Consolidated Edison* case are inconsistent with such decision.[4] The principles of accrual accounting set forth in those findings are correct. A decision supporting them will prevent a taxpayer from taking the inconsistent positions of contesting a liability and at the same time claiming a deduction for it. The position which the government urges seems to us inconsistent with the general policy of obtaining the largest amount of tax revenue at the earliest possible date. In the usual run of cases, the government's insistence that the taxpayer take his deduction in the year of paying under protest a contested liability will result in the receipt of less tax revenue in that year. For this reason (among others) in the *Chestnut Securities* case, the government took a position opposite to that here urged. The government lost that case. In following the Court of Claims without discussing the principles involved, we think Judge Sugarman fell into error. In conformity with those principles summary judgment should have been entered for the plaintiff-appellant.

It is suggested in criticism of our decision that it leaves open to a taxpayer opportunities for manipula-

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[4] See Findings Nos. 35 to 38 inclusive, particularly 38 which reads as follows: "Under accrual accounting, when payment is made with respect to a liability which is denied in whole or in part, the accounting principle as to charges against income would be the same as if payment had not been made; such payment would not affect the treatment of any accruals. This principle applies equally to the payment of taxes. The payment of admitted or estimated ultimate liability constitutes the payment of a current charge or expense of operations and the balance of that payment represents an amount estimated to be ultimately recovered and is chargeable to a suspense, deferred debit, or other receivable account. The latter item represents an asset—a deposit which is expected to be recovered."

tion through self-serving appraisals. Such opportunities are no greater when payment has been made under protest to prevent the attachment of liens or seizure, than when payment has not been made, as in the *Dixie Pine* case. The problem of determining whether the contest is a bona fide one is present in either situation. The criticism, we think, is really directed against the *Dixie Pine* line of decisions.

Accordingly the judgment is reversed and the cause remanded with directions to enter summary judgment for plaintiff-appellant pursuant to paragraphs 12 and 13 of the stipulation of the parties.

CLARK, *Circuit Judge* (dissenting):

Apparently accountants and at least some tax lawyers agree that the Commissioner has not been appropriately hospitable to the precepts of accrual accounting and applaud tentative judicial steps toward accepting such precepts. See, e.g., Behren, *Prepaid Income —Accounting Concepts and the Tax Law*, 15 Tax L. Rev. 343 (1960), discussing *Bressner Radio, Inc.* v. *C. I. R.*, 2 Cir., 267 F. 2d 520. For my part I would not disagree and think that within limits the trend to follow accounting ideas is desirable as bringing tax and business practices mutually into line. But I do feel it must stop short of delivering control of the revenue to the accountants. For accounting is not an exact science; and corporate balance sheets must deal with many fluid items, representing of course much factual information, but also a certain amount of prophecy, of hope, and of sheer argumentation. Because of this, because also the accountant does owe the duty of loyalty to his client, the result will naturally reflect the needs and desires of the client more than the appropriate

demands of the tax collector, who not only must collect all the revenue due, but must hold the balance fairly and without discrimination among taxpayers. And the present holding, which goes beyond anything yet in the books, seems to me to exceed proper bounds in committing final adjudication as to the revenue to corporate accountants.

Consider the actual decision herein. It is that deductions for local tax liability are to be made, not when the liability is due *and* paid, but when some years later and after dispute the parties (not including the representative of the federal revenue) get together and adjust their difference. The opinion suggests no limitation of time or otherwise on the operation of the principle thus broadly announced; and upon reflection I can see none of any actual operative effect. It would seem that a taxpayer, by asserting a dispute as to a liability for taxes paid, may postpone the use of such payment as an income tax deduction practically indefinitely until it finds it expedient to settle the dispute with or without receipt of a refund. I presume the dispute must be honestly asserted with perhaps some indicated possibility of success. But these are such minimal requirements as to the large tax liabilities of great corporations as to be meaningless in practice. Obviously a local tax dispute can be prolonged for years; and extrinsic factors such as a corporate reorganization might prolong it yet further. Moreover, I do not see how the principle can be limited only to tax payments; it would seem applicable to other disputed payments generally. Thus ascertainment of the corporate income is substantially taken out of the hands of the revenue authorities; discrimination between taxpayers is accomplished on the basis of the astuteness of the accountants employed; and the sound rule of *annual* federal tax accounting—perhaps the cornerstone of federal

revenue collecting—is repudiated in a vitally important detail.

Moreover, an examination of the history of plaintiff's real estate tax controversies with the City of New York for the fiscal years here involved indicates that the result reached by the majority does not even accord with generally accepted accounting principles. This is shown clearly by the following table:

City Fiscal Year	Amount of Tax Payment Contested	Amount Refunded	% of Claim
1946–47	$ 292,250.27	$ 132,290.00	45.3
1947–48	2,925,546.94	1,020,232.50	34.9
1948–49	3,239,580.43	764,162.50	23.6
1949–50	3,156,256.61	465,522.50	14.7
1950–51	3,270,292.22	343,745.00	10.5

My brothers are accepting the view that an accountant, viewing the tax payment for the 1950-51 fiscal year, for example, would exclude $3,270,292.22, the amount of the claim, from the tax expense accounts of that period, notwithstanding that prior experience indicates that the corporation was not likely to recover more than about 20 per cent of its claim. The accountant would also be overlooking the fact that in presenting claims based upon disputed property assessments a taxpayer will generally inflate his claim in order to secure a more strategic bargaining position. I see little correspondence between such result and the fundamental aim of accrual accounting which is to match revenues with the expenses incurred in producing such revenues.

When the amount of claimed refund is thus made determinative for federal corporate tax purposes, an open invitation is extended to manipulation through self-serving appraisals. The date and amount of payment, however, appear to me to represent a fixed and definite standard, which should be here adopted in preference to the amount which the corporation unilaterally determines to contest, or to an uncertain estimate

or educated guess as to the amount of refund which may be secured at some unknown future date. See *Automobile Club of Michigan* v. *C. I. R.*, 353 U. S. 180. Moreover, there is little reason why a taxpayer who has suffered an out-of-pocket expenditure in satisfaction of a tax assessment should be penalized by the denial of a deduction merely because he embarks upon the uncertain and often unrewarding course of contesting the amount of the assessment.

Certain Supreme Court decisions are relied on as forcing the result here reached; but at most they subscribe only to the trend as I have done above, and do not try to establish what the limits, so obviously necessary and inevitable, will be. Justice Roberts in *Security Flour Mills Co.* v. *C. I. R.*, 321 U. S. 281, 286, indeed goes so far as to speak disparagingly of taking cash payments, *inter alia*, "out of the annual accounting system and, for the benefit of the Government or the taxpayer, treat[ing them] on a basis which is neither a cash basis nor an accrual basis, because so to do would, in a given instance, work a supposedly more equitable result to the Government or the taxpayer." Neither in that case nor in *Dixie Pine Products Co.* v. *C. I. R.*, 320 U. S. 516, also principally relied on, is there any holding that tax liabilities already paid should not be accounted for taxwise until all disputes have somehow been put at rest.[1] On the other hand, in the only actual

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[1] In *Dixie Pine Products Co.* v. *C. I. R.*, 320 U. S. 516, a taxpayer on the accrual basis was not allowed to deduct state taxes which he was contesting and *had not paid*. No question was raised as to taxes of a previous year which had been paid. In *Security Flour Mills Co.* v. *C. I. R.*, 321 U. S. 281, a taxpayer who was making late reimbursement of a federal processing tax which had been declared invalid was not allowed to deduct these repayments as of the date of the original tax. *Lewyt Corp.* v. *C. I. R.*, 349 U. S. 237, also cited, concerns only the accruing of a federal excess profits tax in a year *earlier* than that of payment. None of these cases suggests the possibility that accrual may occur long after payment.

cases presenting the precise issue, the Court of Claims in reasoned opinions, noting and considering the obstacles I have discussed above, has reached the opposite result, which Judge Sugarman below quite properly followed. See the persuasive opinion of our oft-times colleague Judge Madden in *Chestnut Securities Co.* v. *United States,* 104 Ct. Cl. 489, 62 F. Supp. 574, and of Judge Littleton in this very case in earlier years. *Consolidated Edison Co. of N. Y.* v. *United States,* 133 Ct. Cl. 376, 135 F. Supp. 881, certiorari denied 351 U. S. 909. See also 2 Mertens, Law of Federal Income Taxation §12.67, p. 106, n. 94 (1959 Cum. Supp.). Even though it has been summarily rejected by my brothers, I think Judge Madden in the *Chestnut Securities Co.* case, *supra,* 104 Ct. Cl. 489, 62 F. Supp. 574, 576, has stated the correct principle for decision here that "Accrual, from the debtor's standpoint [and the government's as well], precedes payment, and does not survive it."

I would affirm.

JUDGMENT

U. S. District Court. Filed Jun. 13, 1960. S.D. N. Y.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of May, one thousand nine hundred and sixty.

Present: HON. J. EDWARD LUMBARD, Chief Judge, HON. THOMAS W. SWAN, HON. CHARLES E. CLARK, Circuit Judges.

Civ. 110-191

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded with directions to enter summary judgment for appellant in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

A true copy:

—— ——, Clerk,
By Elsie M. Eiler, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DECISION, ORDER AND JUDGMENT

October 23, 1959.

The facts presented by this litigation are set forth in Judge Palmieri's decision in *Consolidated Edison Company of New York* v. *United States*, 162 F. Supp. 854 (S. D. N. Y. 1958).

The identical issues presented by this litigation, except that they dealt with earlier years, are set forth in Judge Littleton's decision in *Consolidated Edison Company of New York* v. *United States*, 135 F. Supp. 881 (Ct. Cls.) 1955, *cert. denied* 351 U.S. 909. No gainful purpose can be served by repeating the facts or issues.

Assuming that *Standard Oil Company* v. *United States*, 51 AFTR 1688, 56-2 U. S. T. C. Para. 10051 (N. D. Ohio 1956), is not distinguishable on its facts from *Consolidated Edison Company of New York* v. *United States, supra*, I am disposed to follow what was said in the latter case. Accordingly, the plaintiff's motion for summary judgment is denied and the defendant's motion for summary judgment, dismissing the complaint, is granted.

It is so ordered. No further order is necessary.

SIDNEY SUGARMAN,
United States District Judge.

Judgment entered October 23, 1959.

Herbert A. Charlson, Clerk.

APPENDIX B

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) [as amended by Sec. 202(a), Revenue Act of 1941, c. 412, 55 Stat. 687] *Taxes Generally.*—

(1) *Allowance in general.*—Taxes paid or accrued within the taxable year. * * * [with exceptions not material here].

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *

(26 U.S.C. 1946 ed., Sec. 41.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED—

(a) *General rule.*

The amount of all items of gross income shall be included in the gross income for the taxable year in

which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

(26 U.S.C. 1946 ed., Sec. 42.)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

(26 U.S.C. 1946 ed., Sec. 43.)

SEC. 48. DEFINITIONS.

When used in this chapter—

* * * * *

(c) *"Paid or incurred," "paid or accrued".* The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

(26 U.S.C. 1946 ed., Sec. 48.)

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